

1 Kiser will and hereby does seek an order dismissing the counterclaims of Fashions Outlet Of
2 America, Inc.

3 This Motion is brought pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6)
4 on the grounds that Fashions Outlet of America, Inc., has failed to state a claim upon which
5 relief may be granted, and, therefore, its claims for Breach of Fiduciary Duty and for Civil
6 Conspiracy to Commit Fraud should be dismissed with prejudice.

7 This Motion is based on the Notice, the attached Memorandum of Points and
8 Authorities, all the pleadings, records, and files in this action, and all further evidence and any
9 oral argument that may be presented at the time of the hearing.

10 Dated: September 26, 2007

THE LAW OFFICES OF PATRICK KITCHIN

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13 By: Patrick R. Kitchen
14 Attorney for Plaintiff and Cross-Defendant
15 JUSTIN KISER
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MEMORANDUM OF POINTS AND AUTHORITIES

I. REQUEST FOR RELIEF

Pursuant to Federal Rule of Civil Procedure 9(b) and 12(b)(6), Plaintiff and Cross-Defendant Justin Kiser (“Kiser”) seeks an order dismissing the counterclaims of Fashions Outlet of America, Inc. (“Fashions Outlet”) for breach of fiduciary duty and for civil conspiracy to commit fraud. Fashions Outlet fails to state viable claims against Kiser under either of these theories.

II. SUMMARY OF COUNTERCLAIMANT’S ALLEGATIONS

The crux of Counterclaimant’s allegations against Kiser is that while employed as a sales clerk in one of Polo’s stores, Kiser sold an item or two of clothing to a former Polo sales associate using his employee discount and earned a commission on those sales. Kiser’s former employer brought this counterclaim only after Kiser had filed this state-wide class action complaint in State Court. Counterclaimant’s claims are not designed to adjudicate “employee discount abuse” by Kiser, but to challenge Kiser’s standing to serve as a class representative. Fashions Outlet’s claims are, at most, small claims court matters that should not be adjudicated in this complex class action case.

Fashions Outlet alleges Kiser assisted a former employee named Germania use a merchandise credit that was stolen or illegally obtained by Germania, and then caused the merchandise to be mailed to a fictitious customer. (Counterclaim, ¶¶ 5-6.) Fashions Outlet also alleges Kiser purchased merchandise for Germania using her merchandise credit and his employee discount. (Counterclaim, ¶ 9.) Fashions Outlet further alleges Kiser processed a sale for Germania using two separate merchandise credits under a fictitious name. (Counterclaim, ¶ 10). Finally, Fashions Out alleges Kiser earned an 8% commission on one or more of these sales, but does not allege the value of those commissions. (Counterclaim, ¶ 11.)

1 **III. SUMMARY OF ARGUMENT**

2 A. Federal Rule of Civil Procedure 12(b)(6) Requires The Dismissal Of
 3 Counterclaimant's Breach of Fiduciary Claim

4 Federal Rule of Civil Procedure 12(b)(6) requires the dismissal of a claim if the
 5 claimant fails to state a claim upon which relief may be granted and if "it appears beyond
 6 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle
 7 him to relief," Edwards v. Marin Park, Inc. 356 F.3d 1058 (9th Cir. 2004). While a Rule
 8 12(b)(6) motion is not designed to test the strength of a claim, it is the proper, pleading-stage
 9 tool for challenging a claim that is unviable under the applicable law. In Re Silicon Graphics,
 10 Inc. v. McKracken 97-16204 (9th Cir. 07/02/1999).

11 Counterclaimant's allegation that Kiser breached a fiduciary duty to his employer is
 12 such a claim, and should be dismissed with prejudice. (First Cause of Action.) Absent a
 13 special relationship between an employee and an employer, such as that between a corporate
 14 officer and a corporation, an employee does not owe the employer any such heightened duty.
 15 Gabb Business Services v. Lindsay and Newsom Claim Services, Inc. 83 Cal.App.4th 409
 16 (2000). No such special relationship existed between Kiser and Fashions Outlet, and
 17 Counterclaimant cannot allege any such relationship in this instance.

18 B. Federal Rule of Civil Procedure 9(b) Requires The Dismissal Of
 19 Counterclaimant's Civil Conspiracy To Commit Fraud Claim

20 Rule 9(b) provides that "the circumstances constituting fraud or mistake shall be stated
 21 with particularity." Kiser's challenge to Counterclaimant's conspiracy to commit fraud claim
 22 under Federal Rule of Civil Procedure 9(b) for failure to plead with particularity "is the
 23 functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim."
 24 Vess v. Ciba Ceigy 317 F.3d 1097 (9th Cir. 2003.) To avoid dismissal for inadequacy under
 25 Rule 9(b), therefore, the claimant is required to state the time, place, and specific content of
 26 the false representations as well as the identities of the parties to the misrepresentation. *Id.*

1 Cross-Claimant's fraud-based counterclaims do not offer the level of factual specificity
2 required under Rule 9(b).

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4 **IV. THE FIRST CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY**
5 **SHOULD BE DISMISSED BECAUSE KISER DID NOT OWE HIS**
6 **EMPLOYER A FIDUCIARY DUTY**

7 Kiser, a sales clerk, did not owe Fashions Outlet a fiduciary duty. Such a duty is
8 imposed at law only when the two parties are in a special relationship, such as that between a
9 trustee and a beneficiary, principal and agent, or attorney and client. Hearst v. Ganzi (2006)
10 145 Cal.App.4th 1195, 1208

11 Technically, a fiduciary relationship is a recognized legal relationship such as
12 guardian and ward, trustee and beneficiary, principal and agent, or attorney and
13 client....The essence of a fiduciary or confidential relationship is that the
14 parties do not deal on equal terms, because the person in whom trust and
15 confidence is reposed and who accepts that trust and confidence is in a superior
16 position to exert unique influence over the dependent party.

17 Richelle L. v. Roman Catholic Archbishop (2003) 106 Cal.App.4th 257, 271.

18 The court in *Richelle* enumerated the "essential elements" of a fiduciary relationship.

19 1) The vulnerability of one party to the other which 2) results in the
20 empowerment of the stronger party by the weaker which 3) empowerment has
21 been solicited or accepted by the stronger party and 4) prevents the weaker
22 party from effectively protecting itself.
23 *Id.* at 272.

24 In this case, Kiser was a sales clerk in the Polo Ralph Lauren store in San Francisco.
25 (Counterclaim, ¶ 6.) As an hourly sales associate, he was not in a superior position to exert
26 "unique influence over" anyone at Polo. In fact, not even all officers of a corporation are
deemed to be fiduciaries of the company. As the court held in Gabb Business Services v.
Lindsay and Newsom Claim Services, Inc. (2000) 83 Cal.App.4th 409, 420-421: "... an
officer who participates in management of the corporation, exercising some discretionary
authority, is a fiduciary of the corporation as a matter of law. Conversely, a "nominal" officer
with no management authority is not a fiduciary."

Thus, "it appears beyond doubt" that Fashions Outlet cannot prove any set of facts in support of its fiduciary duty claim that would entitle it to relief. This claim should be dismissed without leave to amend. Edwards v. Marin Park, Inc. 356 F.3d 1058 (9th Cir. 2004).

V. THE SECOND CAUSE OF ACTION FOR CONSPIRACY TO COMMIT FRAUD SHOULD BE DISMISSED BECAUSE FASHIONS OUTLET HAS NOT PLED THE CLAIM WITH PARTICULARITY.

A. The Pleading Requirements For Fraud Are Strict

Fraud must be pled "with a high degree of meticulousness." Desaigoudar v. Meyercord 223 F.3d 1020, 1022-1023 (9th Cir. 2000). "[A]llegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense." Hills Transportation v. Southwest Forest Industries, Inc. (1968) 266 Cal.App.2d 702, 707-708. (See, also, Vess v. Ciba Ceigy 317 F.3d 1097 (9th Cir. 2003).)

B. The Pleading Requirements For Conspiracy To Commit Fraud Require An Agreement To Commit Fraud And Overt Acts Designed To Carry Out The Agreement

A claim based on conspiracy to commit fraud must be based on factual allegations showing (1) an agreement to commit fraud and (2) overt acts meant to accomplish the alleged fraud. See, for example, Wasco Products, Inc. v. Southwall Technologies, Inc. 435 F.3d 989, 991-992 (9th Cir. 2006). Counterclaimant's allegations are insufficient for these pleading purposes. Counterclaimant does not allege Kiser and Germania agreed to commit any wrongful act together, except in the most general and conclusory of terms. Instead, Fashions Outlet describes a series of unrelated events that purport to demonstrate the existence of the conspiracy—the purported "overt acts." Yet, the allegations only show that Kiser sold Polo clothes to a former employee at a discount on one or more occasions in violation of Polo's internal employee discount rules.

1 Thus, Fashions Outlet has failed to allege “the most basic and fundamental element
2 of a civil conspiracy.” Wasco Products, Inc. v. Southwall Technologies, Inc., *supra*, 435 F.3d
3 989. In the absence of an agreement to commit fraud, there is no conspiracy.

4
5 C. Fashions Outlet Fails To Allege The Elements Of The Underlying Tort Of
6 Fraud

7 To properly allege fraud, it is fundamental that a claimant plead a representation,
8 usually of fact, which is false, knowledge of its falsity, intent to defraud, justifiable reliance
9 upon the misrepresentation, and damages resulting from that justifiable reliance. Stansfield
10 220 Cal.App.3d at 72-73. Fashion Outlet’s fraud allegations fall short of these strict
11 requirements.

12 1. Fashions Outlet Does Not Allege A Misrepresentation

13 Fashions Outlet describes a series of events over some period of time that it contends
14 constitute one or more false statements. Yet, it cannot identify a single statement made by
15 Kiser that it claims was false. Instead, the counterclaim is limited to allegations that Kiser
16 improperly used his employee discount and sent one pair of blue jeans to a name provided to
17 him by Germania, all in violation of “Polo’s Retail Employee Handbook.” (Counterclaim ¶
18 12.) While this conduct was perhaps a violation of Polo’s employee discount policy, it does
19 not amount to fraud.

20 The remaining allegations regarding the alleged conspiracy focus solely on
21 Germania’s conduct, whom Fashions Outlet alleges improperly obtained and then used
22 merchandise credits to buy Polo clothing. But, because Fashions Outlet cannot in good faith
23 make out a claim for a conspiracy to commit fraud, based on an agreement to do so, the most
24 it can do is assert that Kiser violated its internal employment policies.

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2. Fashions Outlet Does Not Allege Knowledge Of The Falsity Of
A Misrepresentation

In place of a well pled allegation that Kiser was aware of the falsity of specific representations, Fashions Outlet alleges only that “Kiser knew or had reason to know that the purchases made by Germania were made in bad faith...” (Counterclaim ¶¶ 17 and 24.) This conclusory allegation stands in place of any specific factual averment showing Kiser had any specific knowledge of a misrepresentation. Where the claimant fails to adequately plead scienter under Rule 9(b), the claim is subject to dismissal. Vess v. Ciba Ceigy 317 F.3d 1097 (9th Cir. 2003.)

3. Fashions Outlet Does Not Allege Intent To Defraud

The crux of Fashions Outlet’s conspiracy to commit fraud claim is that Kiser assisted a former Polo employee purchase clothing from the company at a discount and thereby obtained a commission on the sale. Yet, Fashions Outlet only pleads the conclusion that Kiser intended to defraud his employer by assisting the former employee. For example, Fashions Outlet alleges Germania obtained merchandise credits that were “either stolen and/or illegally obtained.” (Counterclaim ¶ 5.) Fashions Outlet does not allege Kiser knew the credits were stolen or illegally obtained, only that he should have known. Thus, Fashions Outlet is attempting to create the illusion of a “conspiracy” between two persons by tacking together independent acts.

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1 **VI. CONCLUSION**

2 For the foregoing reasons, Plaintiff and Cross-Defendant Justin Kiser respectfully
3 requests that Fashions Outlet's counterclaims be dismissed without leave to amend.

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5 Dated: September 26, 2007

THE LAW OFFICE OF PATRICK KITCHIN

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